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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

KEVIN GALLAGHER, on behalf of himself; and DONOR NO. 1, individually and on behalf of all anonymous donors to Free Barrett Brown, Plaintiffs, v. UNITED STATES; CANDINA HEATH; ROBERT SMITH; DOES 1-10, Defendants.	C 17-0586 MEJ **DEFENDANTS CANDINA HEATH AND ROBERT SMITH'S NOTICE OF MOTION AND MOTION TO DISMISS; [PROPOSED] ORDER** Date: August 17, 2017 Time: 10:00 a.m. Judge: Maria-Elena James Courtroom B, 15th Floor, 450 Golden Gate Ave., San Francisco, CA

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NOTICE OF MOTION AND MOTION TO DISMISS

PLEASE TAKE NOTICE THAT on August 17, 2017, at 10:00 a.m., before the Honorable Maria-Elena James, Courtroom B, 15th Floor, 450 Golden Gate Avenue, San Francisco, California, 94102, Defendants Candina Heath and Robert Smith will and hereby do move this Court for an order dismissing Plaintiffs Kevin Gallagher and Donor No. 1's Complaint. Defendants Heath and Smith are entitled to dismissal on Count One, the First Amendment claim, pursuant to Rules 12(b)(2) and 12(b)(6) of the Federal Rules of Civil Procedure because Count One fails to allege a plausible claim for relief and this Court lacks personal jurisdiction over these defendants in their individual capacities. This motion is based on this Notice; the accompanying Memorandum of Points and Authorities; the Court's files and records in this action; Plaintiffs' Complaint; any matter that may be judicially noticed; and any other matter that the Court may consider at any oral argument that may be presented in support of this motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Simultaneous with this motion, the United States has substituted itself under the "Westfall" Act for Defendants Candina Heath and Robert Smith on Count Three of the Complaint. *See* 28 U.S.C. § 2679(d)(1); *Osborn v. Haley*, 549 U.S. 225, 230 (2007) ("Upon the Attorney General's certification, the employee is dismissed from the action, and the United States is substituted as defendant in place of the employee. The litigation is thereafter governed by the Federal Tort Claims Act (FTCA)."). That means the sole remaining claim against them in their individual capacities is Count One, the First Amendment claim. This motion seeks dismissal of that claim for three reasons. This Court should first dismiss Count One because it purports to be a *Bivens* claim but does not seek damages. That being so, precedent requires dismissal. *See Ministerio Roca Solida v. McKelvey*, 820 F.3d 1090, 1096 (9th Cir. 2016) (holding that *Bivens* claims that do not seek damages must be dismissed for failure to state a claim).

Second, Count One fails to plausibly allege a First Amendment violation. During her prosecution of Barrett Brown, Assistant United States Attorney (AUSA) Heath issued a third-party subpoena to WePay, Inc., an online company that retained records of anonymous donations to assist Brown in his defense. The complaint alleges that the purpose of the WePay subpoena was to retaliate against and

surveil those anonymous donors for supporting Brown, all in violation of the First Amendment. Compl. ¶ 28. That allegation is insufficient to plead a claim or show entitlement to relief because it is based solely on "information and belief" and there is an obvious alternative explanation for the WePay subpoena: to determine if Brown, who was previously appointed a public defender, could afford his own attorney. Indeed, after AUSA Heath received the WePay information, she moved the district court to redirect the funds. In response, the district court ordered Brown to update his financial affidavit, which revealed that he had amassed some $20,000 in funds. The magistrate judge found that "it is clear the funds in question were obtained on behalf of the Defendant for the purpose of retaining counsel," and that "the Governments [*sic*] Motion was filed in the interests of justice and to assure the Defendant is not wrongly receiving court-appointed counsel when he should not." *See, e.g.*, Order, *United States v. Brown*, No. 12-317 (N.D. Tex.) (ECF 64). This obvious alternative explanation renders the bald allegation of retaliation implausible. *Cf. Ashcroft v. Iqbal*, 556 U.S. 662, 682 (2009) ("As between that 'obvious alternative explanation' for the arrests, and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion.") (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 567 (2007)). And once that allegation is put aside, the First Amendment analysis is straight-forward: because the government has a legitimate interest in assuring that public defender resources are not abused and there was a sufficient nexus between the target and the purpose of the subpoena, the subpoena outweighed any First Amendment right to anonymity.

Third, this Court lacks personal jurisdiction over AUSA Heath and SA Smith in their individual capacities because the only alleged connection to California was issuance of a subpoena to a third-party company. Compl. ¶ 6. Contacts between the defendant and a third party are insufficient to establish personal jurisdiction. *See Walden v. Fiore*, 134 S. Ct. 1115, 1125 (2014). Donor No. 1 alleges that he too resides in California and was thus harmed there. Compl. ¶ 6. But to establish personal jurisdiction, precedent requires an allegation that the defendants *knew* their conduct would likely harm a forum resident. *See Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1206 (9th Cir. 2006) (en banc). Because the donors to the Free Barrett Brown fund were all anonymous and potentially located all over the world, no *known* California resident was targeted sufficient to create

personal jurisdiction in that state. Also, the records provided in response to the subpoena were disclosed in Texas and filed in the district court under seal. Thus, Donor No. 1 cannot plausibly claim that any harm occurred in California. Finally, it would be unfair and unreasonable to subject federal employees to personal jurisdiction in another state simply because they attempted to gather information about money rightfully payable to the district court in Texas. They had no control over where the Free Barrett Brown records were located and thus, the connection to California is too fortuitous to create personal jurisdiction over them.

For these reasons, this Court should dismiss Count One for failure to state a claim, and as that is the sole remaining claim against these defendants in their individual capacities, the Court should dismiss them from this suit altogether. This Court should also dismiss them for lack of personal jurisdiction.

II. BACKGROUND

A. Facts

For the limited purpose of ruling on a motion to dismiss for failure to state a claim, courts are to "take all of the factual allegations in the complaint as true, [they] are not bound to accept as true a legal conclusion couched as a factual allegation." *Graham-Sult v. Clainos*, 756 F.3d 724, 748 (9th Cir. 2014). Plaintiffs Kevin Gallagher, on behalf of himself, and Donor No. 1, individually and on behalf of all anonymous donors to the Free Barrett Brown fund, filed this class action lawsuit against Defendants the United States of America, Candina Heath, an Assistant United States Attorney for the Northern District of Texas, and Robert Smith, a Special Agent (SA) of the Federal Bureau of Investigation. According to the complaint, in December 2011, Barrett Brown transferred a link to a file containing private credit card information from one public chatroom to another. Compl. ¶ 20. In early 2012, the FBI executed a search warrant at the residence of Brown's mother. *Id.* ¶ 21. In response, Brown posted three videos on www.youtube.com and made several statements on www.twitter.com threatening SA Smith. *Id.* ¶ 22. A grand jury indicted Brown for aggravated identify theft based on his electronic transmittal of personal credit card information, and for internet threats and retaliation against a federal officer based on his online threats against SA Smith. *Id.*

Gallagher alleges he started a crowd-funding campaign to raise funds for Brown's defense. He

dubbed it "Free Barrett Brown" and used a company called WePay, Inc., to create a webpage and assist him in accepting donations and publicizing his cause through social media and Google searches. *Id.* ¶ 24. WePay also provided a recordkeeping service that helped Gallagher thank donors. *Id.* According to the complaint, individuals donated over $40,000 to the Free Barrett Brown fund and to do so, provided WePay with their bank account or credit card information to complete the transaction. *Id.* ¶ 25.

The complaint alleges "on information and belief" that AUSA Heath and SA Smith conspired to draft and serve a subpoena on WePay to "unlawfully identify, target, and surveil supporters of" Brown. *Id.* ¶ 28. The complaint also alleges that in furtherance of this scheme, another subpoena was sent to a web-hosting company called CloudFlare, Inc., but the complaint does not allege any additional information about this subpoena or what it sought. *Id.* Again without specifics, the complaint alleges "on information and belief" that the scheme sought information from social media websites, payment processing companies, financial institutions, and other crowd-funding websites to identify and obtain as much information as possible about Brown supporters. *Id.* Donor No. 1 "*believes* this scheme was initiated to harass the donors and retaliate against them for the donors' exercise of protected conduct – making anonymous donations in support of Mr. Brown's legal defense." *Id.* (emphasis added). Donor No. 1 also "*believes* this scheme continues today" and that the information obtained "is currently being used to monitor Brown's supporters." *Id*. (emphasis added).

Based on these allegations, Donor No. 1 and the proposed Class raise a First Amendment claim for violation of the right to donate and associate anonymously (Count One), as well as a privacy claim under the California Constitution (Count Three). Gallagher, Donor No. 1, and the proposed Class also raise a statutory claim under the Stored Communications Act (Count Two). This motion addresses only Count One – the First Amendment claim – which this Court should dismiss with prejudice.

B. Additional Facts[1]

On September 13, 2012, Brown filed a financial affidavit in his criminal case and was appointed a public defender. *See United States v. Brown*, No. 12-317 (N.D. Tex.) (Docket Sheet, ECF #10). On

[1] Along with the motions to dismiss, Defendants have filed a motion for the Court to take judicial notice of the WePay subpoena, WePay's response, and the court filings from the Brown criminal case.

January 23, 2013, AUSA Heath issued the WePay subpoena. *See* Subpoena to Testify at a Hearing or Trial in a Criminal Case. That subpoena sought "any and all records and information for the account of 'WePay-FREE BARRETT BROWN,'" including (1) subscriber records and information for the user of the account; (2) financial information regarding the user; (3) sources of the funds; (4) physical location of the funds; (5) a complete transaction history; and (6) all records and information obtained from any verification checks on purchasers. *Id.* WePay responded to the subpoena on February 1, 2013. *See* WePay Summary of Account and Affidavit. At the time of WePay's response, Brown's mother, Karen Lancaster, administered the account and 26 individuals had donated $4,411.96 to the fund. *Id.*

On February 13, 2013, AUSA Heath filed a motion to direct the funds from the WePay account to the Office of the Federal Public Defender in the Northern District of Texas. *See, e.g.*, Government's Motion to Direct Funds Be Paid, *United States v. Brown*, No. 12-317 (N.D. Tex.) (filed under seal in the criminal cases). On March 29, 2013, the district court ordered Brown to submit an updated financial affidavit, and referred the matter to the magistrate judge on April 16, 2013. *See* Order, *United States v. Brown*, No. 12-317 (N.D. Tex.) (ECF 49). On April 17, 2013, the magistrate judge reviewed Brown's updated financial affidavit, which indicated he had received $20,000 in contributions for his legal defense, and ordered the funds placed in the court registry. *See* Order, *United States v. Brown*, No. 12-317 (N.D. Tex.) (ECF 50). A hearing was set for May 1, 2013. *Id.* However, on the date of the hearing, Brown retained private counsel. *See* Motions to Substitute Attorney, *United States v. Brown*, No. 12-317 (N.D. Tex.) (Docket Sheet, ECF 56). On May 30, 2013, the magistrate judge in a written order denied the motion to direct the funds to the Office of the Public Defender, instead finding that "the release of the money to retained counsel will save the taxpayers more than if the Court forfeited the funds to pay for a portion of the costs of the Federal Public Defender." *See* Order, at 1, *United States v. Brown*, No. 12-317 (N.D. Tex.) (ECF 64) ("5/30/2013 Order"). However, the magistrate judge also stated:

> After hearing argument of counsel and reviewing the evidence submitted, it is clear the funds in question were obtained on behalf of the Defendant for the purpose of retaining counsel. This Court finds the funds should be used for that purpose. *The Court finds the Governments [sic] Motion was filed in the interests of justice and to assure the Defendant is not wrongly receiving court-appointed counsel when he should not.*

Id. at 1 (emphasis added).

III. ARGUMENT

A. Donor No. 1 has not stated a viable claim for relief against the Individual Defendants.

Because the United States has substituted itself for AUSA Heath and SA Smith on Count Three, the only remaining individual-capacity claim against them is Count One, which purports to allege a First Amendment claim under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Compl. ¶¶ 7, 14-15. Count One is legally insufficient for the simple reason that it does not seek damages.

In *Bivens*, the Court "recognized for the first time an implied private action *for damages* against federal officers alleged to have violated a citizen's constitutional rights." *See Iqbal*, 556 U.S. at 675-76 (citing *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001)) (emphasis added).[2] A key component to a *Bivens* claim is a demand for damages. But Donor No. 1 does not seek damages on Count One, instead limiting the prayer to declaratory and injunctive relief. *Compare* Compl. at 15 (Count One – seeking a declaration that "the conduct alleged above violated the First Amendment," and an order "[d]irecting the FBI, DOJ, and other agencies or entities that received donors' private, sensitive, information to destroy such information" and "[e]njoining Defendants from engaging in similar unlawful surveillance in the future"); *with id.* at 15-16 (Counts Two and Three – both explicitly seeking "damages"). That being so, precedent compels dismissal of Count One.

In *Ministerio Roca Solida v. McKelvey*, 820 F.3d 1090, 1091 (9th Cir. 2016), the Ninth Circuit squarely addressed "whether a federal officer can be sued in her individual capacity for purely injunctive relief under *Bivens*." The court's answer was an unequivocal no: "[i]n answering no, we join our sister circuits in holding that relief under *Bivens* does not encompass injunctive and declaratory relief where, as here, the equitable relief sought requires official government action." *Id.* at 1093. The court noted that the Supreme Court has "continued to emphasize that money damages is the remedy under *Bivens*." *Id.* (citing *Carlson v. Green*, 446 U.S. 14, 18 (1980) and *Butz v. Economou*, 438 U.S. 478, 504 (1978)).

[2] The Court did so only after finding no "special factors counselling hesitation." *Bivens*, 403 U.S. at 396. *Bivens* was a Fourth Amendment case. The Supreme Court has never recognized a *Bivens* claim for a First Amendment violation. *See Reichle v. Howards*, 566 U.S. 658, 663 n.4 (2012).

Moreover, the court reasoned, "*Bivens* is both inappropriate and unnecessary for claims seeking solely equitable relief against actions by the federal government. . . . [because] *Bivens* suits are individual capacity suits and thus cannot enjoin official government action." *Id*. Thus, the court ordered the *Bivens* claim "dismiss[ed] for failure to state a claim." *Id.* at 1096. The same result is required here.

The boilerplate request for "[a]ny other relief the Court deems proper" cannot save Count One. *See* Compl., at 15. Courts routinely refuse to read a request for damages into boilerplate prayers for relief. *See Arizonans for Official English v. Ariz.*, 520 U.S. 43, 71, 80 (1997) (attempt to read boilerplate prayer for relief to include damages "bore close inspection," and ultimately did not save case from dismissal); *see also Brown v. Buhman*, 822 F.3d 1151, 1169 n.19 (10th Cir. 2016), *cert. denied*, 137 S. Ct. 828 (2017); *Emory v. United Air Lines, Inc.*, 720 F.3d 915, 921 n.10 (D.C. Cir. 2013); *Thomas R.W. by & Through Pamela R. v. Mass. Dep't of Educ.*, 130 F.3d 477, 480 (1st Cir. 1997); *Fox v. Bd. of Trustees of the State Univ.*, 42 F.3d 135, 141-42 (2d Cir. 1994). The request for "costs, including reasonable attorney's fees, associated with bringing this action" also cannot save Count One. *See* Compl., at 15. "[C]osts and attorney's fees are not damages." *Motorola, Inc. v. Fed. Express Corp.*, 308 F.3d 995, 1007 n.13 (9th Cir. 2002). The Ninth Circuit has also held that no "statutory or contractual provision or any judicially-created doctrine" justifies a prayer for attorney's fees on a *Bivens* claim. *See Nurse v. United States*, 226 F.3d 996, 1004 (9th Cir. 2000). Thus, Donor No. 1 is not entitled to attorney's fees on Count One in any event.[3]

In the end, Count One, which purports to be a *Bivens* claim, does not seek damages. Precedent accordingly demands dismissal. And as that is the only remaining claim against AUSA Heath and SA Smith in their individual capacities, this Court should dismiss them from this suit altogether.[4]

[3] Nor can Count One be salvaged by instead construing it as an official-capacity claim seeking only declaratory and injunctive relief. It is not pled that way, and in any event it would still be subject to dismissal for lack of subject matter jurisdiction "because the United States has not consented to its officials being sued in their official capacities" under *Bivens*. *See Roca Solida*, 820 F.3d at 1095 (quoting *Consejo De Desarrollo Economico De Mexicali, A.C. v. United States*, 482 F.3d 1157, 1173 (9th Cir. 2007)).

[4] Perhaps Donor No. 1 omits a request for damages on Count One because the request would be futile. The Ninth Circuit has held that absolute immunity protects a prosecutor from civil liability for her decision to issue a criminal subpoena. *See Garmon v. County of L.A.*, 828 F.3d 837, 844-45 (9th Cir. 2016). Even if absolute immunity did not apply, AUSA Heath and SA Smith would be entitled to

B. Donor No. 1 does not plausibly allege a First Amendment violation.

Not only is Count One subject to dismissal for failure to seek damages, Donor No. 1 also fails to plausibly allege a First Amendment violation. The complaint purports to allege a First Amendment right to speak and associate anonymously. But to the extent the WePay subpoena had any effect on Donor No. 1's First Amendment rights, Count One still fails for two reasons. First, Donor No. 1's allegation of First Amendment retaliation is based solely on "information and belief," which this Court should reject, particularly in light of the obvious alternative explanation for the WePay subpoena: to determine if Brown could afford an attorney. Second, this obvious alternative explanation also serves as a legitimate purpose for issuing the WePay subpoena that outweighed any First Amendment interest in anonymity as a matter of law.

1. Donor No. 1 fails to plausibly allege retaliation.

As the Supreme Court made clear in *Iqbal*, to survive a motion to dismiss, claims against government officials must contain factual allegations plausibly suggesting their direct involvement in a constitutional violation. 556 U.S. at 676. In that case, the plaintiff alleged that the Attorney General and FBI Director adopted an unconstitutional policy in the wake of the September 11 attacks that subjected the plaintiff to harsh conditions of confinement because of his race, religion, or national origin. *Id.* at 666. But the Court rejected the allegation of discriminatory motive. *Id.* at 681. In doing so, the Court noted that although the widespread detention of Arabs and Muslims was *consistent* with the allegation that the defendants purposefully designated individuals because of their race, religion, or national origin, an "obvious alternative explanation" existed. *Id.* at 682. Indeed, because "[t]he September 11 attacks were perpetrated by 19 Arab Muslim hijackers," the Court noted, "[i]t should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the

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qualified immunity for the reasons stated in Section III.B., namely that the complaint fails to plausibly allege a First Amendment violation, let alone the violation of a clearly-established First Amendment right. *See Cmty. House, Inc. v. City of Boise*, 623 F.3d 945, 967 (9th Cir. 2010) (applying the qualified immunity standard). Indeed, AUSA Heath and SA Smith have not found a single case even remotely addressing the question of whether the issuance of a subpoena to determine if a criminal defendant can afford an attorney implicates the First Amendment.

purpose of the policy was to target neither Arabs nor Muslims." *Id.* The Court explained: "[a]s between that obvious alternative explanation for the arrests, . . . and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion." *Id.* (internal quotations and citation omitted). And having failed to allege more by way of factual content, the Court concluded that the plaintiff had failed to "nudge" his claim of purposeful discrimination "across the line from conceivable to plausible." *Id.* at 683 (citation omitted).

The Ninth Circuit first applied *Iqbal* in *Moss v. United States Secret Service*, 572 F.3d 962 (9th Cir. 2009), which, like here, involved allegations of First Amendment retaliation. There, the plaintiffs alleged that Secret Service agents engaged in retaliation when they ordered local police to move anti-Bush demonstrators away from public areas outside where the President was dining. *Id.* at 969-70. The court held that to succeed on their retaliation claim, the protesters needed to establish that the agents acted "*because of* not merely in spite of, the demonstration's anti-Bush message." *Id.* at 970. It noted that bald allegations of impermissible motive standing alone were insufficient and not entitled to an assumption of truth. *Id.* The court then inquired whether it could reasonably infer a First Amendment violation given that the anti-Bush protesters were moved blocks away while pro-Bush diners and guests at the inn were allowed close proximity to the President. *Id.* at 971. The court concluded that "[t]he[se] facts do not rule out the *possibility* of viewpoint discrimination, and thus at some level they are consistent with a viable First Amendment claim, but mere possibility is not enough. . . . [the complaint] therefore fails to satisfy . . . *Iqbal*." *Id.* at 971-72 (emphasis added); *see also Eclectic Props. East, LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 996 (9th Cir. 2014) ("When considering plausibility, courts must also consider an 'obvious alternative explanation' for defendant's behavior.") (citation omitted); *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1108 (9th Cir. 2013) ("When faced with two possible explanations, only one of which can be true and only one of which results in liability, plaintiffs cannot offer allegations that are 'merely consistent with' their favored explanation but are also consistent with the alternative explanation. Something more is needed, such as facts tending to exclude the possibility that the alternative explanation is true in order to render plaintiffs' allegations plausible within the meaning of *Iqbal* . . . .") (citations omitted).

Two takeaways from these cases are (1) bald allegations of impermissible retaliation, conspiracy, and motive based on information and belief are not entitled to an assumption of truth, and (2) allegations that are merely consistent with unlawful conduct do not state a plausible claim for relief, particularly in light of an obvious alternative explanation. Applying these standards here, this Court should reject the bald allegation that the WePay subpoena was part of some government conspiracy to retaliate against and surveil Brown supporters, particularly in light of the obvious alternative explanation for the WePay subpoena: to determine if Brown could afford an attorney. Indeed, after she received the WePay response, AUSA Heath filed a motion to direct the WePay funds be paid to the Public Federal Defender and attached the WePay response in support, all under seal. These facts, of which this Court may take judicial notice, underscore that the bare allegation that "Defendants never intended to allow the information subpoenaed from WePay to see the inside of Mr. Brown's courtroom" is not supported by any objective fact, or even a well-pleaded allegation, and should not be credited by this Court. Compl. ¶ 44. The district court responded to the motion by ordering Brown to update his financial affidavit and the magistrate judge directed the newly-obtained funds be paid to Brown's newly-retained counsel. The magistrate judge also found that "the Governments [*sic*] Motion was filed in the interests of justice and to assure the Defendant is not wrongly receiving court-appointed counsel when he should not." *See* 5/30/2013 Order, at 1. As between that obvious alternative explanation for the subpoena and the bald allegation of government conspiracy, retaliation is simply not a plausible conclusion. And having failed to allege more by way of factual content, Donor No. 1 fails to "nudge" his First Amendment retaliation claim across the line from conceivable to plausible. *Cf. Ctr. for Competitive Politics v. Harris*, 784 F.3d 1307, 1317 (9th Cir. 2015) (where disclosure is to government not public at large, speculative allegations of government retaliation do not state a claim); *Sams v. Yahoo! Inc.*, 713 F.3d 1175, 1181 (9th Cir. 2013) (bald allegation that subpoena was issued in bad faith does not satisfy *Iqbal* and is insufficient to withstand motion to dismiss).[5]

[5] Donor No. 1 alleges that the WePay subpoena was improper because WePay was directed to send its response to SA Smith as opposed to AUSA Heath. *See* Compl. ¶ 31. But it makes sense to direct the responsive documents directly to the case agent so that if necessary, he or she is able to testify about them, including, for example, providing testimony relating to the chain of custody for authentication purposes. Had the documents been sent directly to AUSA Heath, she would have made herself a

2. The WePay Subpoena easily outweighs any alleged First Amendment interests.

At the outset, it is far from clear *any* First Amendment rights were implicated by the WePay subpoena. First, it is well established there is no expectation of privacy in transactional records retained by a third party even if the information was relayed on a promise of confidentiality. *See United States v. Miller*, 425 U.S. 435, 442-43 (1976); *see also In re Grand Jury Subpoena Duces Tecum*, 549 F.2d 1317, 1318 (9th Cir. 1977) (no First Amendment interest in transactional records held by third-party). Second, to the extent there is a right in anonymity to online messages, the WePay subpoena did not specifically target online messages and in fact, the WePay response did not provide any. Nor does the complaint even allege that Donor No. 1 provided an online message at all. *See Chevron Corp. v. Donziger*, No. 12-80237, 2013 U.S. Dist. LEXIS 119622, *7 (N.D. Cal. Aug. 22, 2013) (subpoena targeting identity of email account holders did not implicate First Amendment because it did not target online messages). Third, with respect to the association claim, there is no allegation the donors to the Free Barrett Brown fund are members of an organized group, that they patron the same establishment, or that they have ever met or conversed at all. Anyone could donate regardless of any particular message he or she wanted to convey. Based on these facts, it is far from clear whether the fund is a protected association. *See Dallas v. Stanglin*, 490 U.S. 19, 24-25 (1989) (no association right where members of dance hall did not patron same places and were mostly strangers to each other, and where anyone could attend without having to take a position on a public question or perform the same activities); *Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh*, 229 F.3d 435, 444 (3d Cir. 2000) ("A few minor charitable acts do not alone make a group's association expressive. . . ."). However, this Court need not reach these issues because even if some First Amendment rights were implicated, the purpose for issuing the WePay subpoena easily outweighed them. *See Preminger v. Peake*, 552 F.3d 757, 765 (9th Cir. 2008) ("[T]he privileges afforded by the First Amendment are not absolute.").

Because Donor No. 1 does not plausibly plead retaliation, the First Amendment inquiry boils

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potential witness in the criminal case. *Cf. Kalina v. Fletcher*, 522 U.S. 118, 130 (1997) ("Indeed, tradition, as well as the ethics of our profession, generally instruct counsel to avoid the risks associated with participating as both advocate and witness in the same proceeding.") (citation omitted).

down to whether the Government had a legitimate purpose for issuing the WePay subpoena that outweighs any harm to First Amendment interests. *See United States v. Mayer*, 503 F.3d 740, 744 (9th Cir. 2007) ("We agree and clarify that . . . an investigation threatening First Amendment rights, like any government investigation, be justified by a legitimate law enforcement purpose that outweighs any harm to First Amendment interests."). Whether an interest is legitimate or compelling is a question of law. *See Scott v. Rosenberg*, 702 F.2d 1263, 1274 (9th Cir. 1983). In the context of investigations requiring disclosure of anonymous groups, as well as criminal subpoenas implicating the First Amendment, courts also consider whether there is a sufficient nexus between the government purpose and the target of the investigation. *Mayer*, 503 F.3d at 748 (interpreting Supreme Court precedent as sustaining a First Amendment challenge to required disclosure only where there is no compelling interest or no substantial connection between the investigation and the information sought); *see also In re Grand Jury Subpoena*, 201 F. App'x 430, 432 (9th Cir. 2006) (with respect to grand jury subpoena, "a limited balancing of First Amendment interests may be conducted only where a grand jury inquiry is not conducted in good faith, or where the inquiry does not involve a legitimate need of law enforcement, or has only a remote and tenuous relationship to the subject of the investigation") (internal quotations and citation omitted).[6]

With respect to the interest prong, a subpoena targeting a transactional history is by no means an unusual occurrence. "The government routinely issues subpoenas to third parties to produce a wide variety of business records, such as credit card statements, bank statements, hotel bills, purchase orders, and billing invoices." *United States v. Davis*, 785 F.3d 498, 506 (11th Cir. 2015) (en banc). And courts enforce those subpoenas notwithstanding that the targeted records "reveal intimate details of daily life, such as shopping habits, medical visits, and travel plans." *Id.* at 505 n.9. Here, there can be no serious dispute that the government has a legitimate, if not compelling, interest in determining whether public defender resources are being abused. Several courts, including this Court, have recognized "the interests of the government in limiting court appointment of counsel to financially qualified individuals." *See*

[6] In fact, the Supreme Court has intimated that the *only* First Amendment constraint on a government subpoena is where the subpoena is issued in bad faith. *See Univ. of Pa. v. EEOC*, 493 U.S. 182, 201 n.8 (1990) (citations omitted).

United States v. Hickey, 997 F. Supp. 1206, 1210 (N.D. Cal. 1998) (James, M.J.) (collecting cases). Indeed, 18 U.S.C. § 3006A(c) specifically authorizes district courts to terminate the appointment of counsel if the court finds that a criminal defendant is "financially able to obtain counsel or make partial payment for the representation;" and if the court becomes aware of funds "available for payment from or on behalf of a person furnished representation," Section 3006A(f) authorizes district courts to "direct that such funds be paid to the appointed attorney . . . or to the court for deposit in the Treasury as a reimbursement to the appropriation." And the Guide to Judicial Policy, which outlines the requirements for appointment or termination of counsel, cements the prosecution's role in the process. *See* Guide to Judicial Policy, Vol. 7, Part A, Chapter 2: Appointment and Payment of Counsel, § 210.40.20(g) ("The prosecution and other interested entities may present to the court information concerning the person's [financial] eligibility. . . .").[7] This Court has in fact entertained Section 3006A motions filed by the government after the prosecutor learned the criminal defendant had money to afford an attorney. *See Hickey*, 997 F. Supp. at 1209-10 (James, M.J.).

There can also be no serious dispute that there was a sufficient nexus between the government's interest in ensuring that public defender resources were not being abused and the WePay subpoena, especially given the magistrate judge's finding that "it is clear" the funds targeted by the subpoena "were obtained on behalf of [Brown] for the purpose of retaining counsel" and that "the funds should be used for that purpose." 5/30/2013 Order, at 1. A subpoena will generally survive a nexus challenge as long as the information requested "touches a matter under investigation." *EEOC v. Elrod*, 674 F.2d 601, 613 (7th Cir. 1982) (citation omitted). That is surely the case here. *Cf. Harris*, 784 F.3d at 1317 (compelled disclosure of charitable donations bore "substantial relation" to "sufficiently important" interest in assuring validity, and interest was sufficient to outweigh First Amendment right to anonymity); *Scott*, 702 F.2d at 1275-76 (where government had compelling interest in whether charitable donations were being spent appropriately and investigation sought transaction records, nexus between information sought and government objective was "sufficiently close" to override First

[7] Available at http://www.uscourts.gov/rules-policies/judiciary-policies/cja-guidelines/chapter-2-ss-210-representation-under-cja

Amendment concerns).

For these reasons, even if Donor No. 1 had some First Amendment interest in anonymity under the circumstances alleged, the legitimate purpose for issuing the WePay subpoena easily outweighed that interest as a matter of law. This Court should accordingly dismiss the First Amendment claim with prejudice.

C. This Court lacks personal jurisdiction over AUSA Heath and SA Smith.

In addition to the complaint's many pleading deficiencies on the First Amendment claim, personal jurisdiction over AUSA Heath and SA Smith in their individual capacities is lacking. To bring an action against a federal employee in his or her individual capacity, a plaintiff must show that the court has personal jurisdiction over each defendant. *See Sher v. Johnson*, 911 F.2d 1357, 1365 (9th Cir. 1990); *Gilbert v. DaGrossa*, 756 F.2d 1455, 1459 (9th Cir. 1985); *see also Walden v. Fiore*, 134 S. Ct. 1115, 1125 (2014) (court could not exercise personal jurisdiction over *Bivens* defendant where defendant had no contacts with forum state). On a motion to dismiss for lack of personal jurisdiction decided solely on the pleadings, the plaintiff bears the burden of demonstrating that the allegations, taken as true, would establish a prima facie case for jurisdiction. *See Boschetto v. Hansing*, 539 F.3d 1011, 1015 (9th Cir. 2008). Donor No. 1 has not carried that burden here. Donor No. 1 has not alleged that AUSA Heath and SA Smith reside in California. Nor has Donor No. 1 alleged facts that would establish jurisdiction over these defendants as nonresidents.

Because this is an individual-capacity suit, the nationwide venue and service of process provisions of 28 U.S.C. § 1391(e) do not apply. *See Stafford v. Briggs*, 444 U.S. 527, 543-45 (1980). This case is thus governed by the general rule that "[f]ederal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons." *Walden*, 134 S. Ct. at 1121. That follows from Federal Rule of Civil Procedure 4(k)(1)(A), which applies here and provides that service of a summons establishes personal jurisdiction over a defendant "who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located[.]" California has authorized its courts to exercise jurisdiction over persons "on any basis not inconsistent with the Constitution of this state or of the United States." Cal Code Civ. Proc. § 410.10. Thus, in order for this Court to exercise

personal jurisdiction here, Donor No. 1 must allege facts sufficient to show that the exercise of such jurisdiction "comports with the limits imposed by federal due process." *Walden*, 134 S. Ct. at 1121; *see also Boschetto*, 539 F.3d at 1015 ("California's long-arm statute is co-extensive with federal standards, so a federal court may exercise personal jurisdiction if doing so comports with federal constitutional due process."). To satisfy due process, a plaintiff must demonstrate that the defendant has certain "minimum contacts with the relevant forum such that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice." *Id.* (quoting *Int'l Shoe v. Wash.*, 326 U.S. 310, 316 (1945) (internal quotation marks omitted); *see also Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 801 (9th Cir. 2004). The analysis hinges on the *defendant's* contacts with the forum; contacts between the plaintiff or some third party with the forum cannot satisfy the minimum-contacts inquiry. *Id.* at 1122-23; *see also Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1156 (9th Cir. 2006).

The minimum-contacts inquiry can give rise to two types of personal jurisdiction. First, a plaintiff may allege facts sufficient to establish that the nonresident defendant's contacts with the forum are so "substantial," "continuous," and "systematic" that the defendant is subject to general jurisdiction in that forum. *See Schwarzenegger*, 374 F.3d at 801. Second, a plaintiff may allege facts sufficient to establish specific jurisdiction, that is, that the nonresident defendant's contacts with the forum gave rise to the lawsuit. *See id.* at 801-02. Donor No. 1 does not attempt to allege any facts establishing general jurisdiction. Instead, Donor No. 1 appears to be asserting specific jurisdiction, relying on the allegation that "[b]y sending the subpoena to WePay's headquarters in Palo Alto, California, Defendants engaged in intentional action that was expressly aimed at, and caused harm in, California." Compl. ¶ 6.

Before a court will exercise specific jurisdiction over a nonresident defendant, a plaintiff must allege facts sufficient to demonstrate that (1) the defendant purposefully directed his or her activities at the forum; (2) the lawsuit arises out of those forum-related activities; and (3) the exercise of jurisdiction must comport with fair play and substantial justice, *i.e.*, it must be reasonable. *Schwarzenegger*, 374 F.3d at 802. The plaintiff bears the burden of satisfying the first two requirements. *Id.* If the plaintiff fails to satisfy either, personal jurisdiction is not established in the forum. *Id.* However, if the plaintiff satisfies both requirements, then the burden shifts to the defendant to present a "compelling case" that

the exercise of personal jurisdiction would be unreasonable. *Id.* (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-78 (1985)). Donor No. 1 has not satisfied the first requirement because AUSA Heath and SA Smith did not purposefully direct their activities at California. Even if they did, there is a compelling case that the exercise of jurisdiction would be unreasonable under these circumstances.

1. Defendants did not purposefully direct their activities at California.

The Ninth Circuit treats "purposeful availment" differently in tort and contract cases. *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1206 (9th Cir. 2006) (en banc). In tort cases, the court asks whether the defendant "purposefully direct[s] his activities" at the forum state, applying the "effects test" derived from *Calder v. Jones*, 465 U.S. 783 (1984). *Id.* The Ninth Circuit construes *Calder* to impose three requirements: "the defendant allegedly [must] have (1) committed an intentional act; (2) expressly aimed at the forum state; (3) causing harm that the defendant knows is likely to be suffered in the forum state." *Id.* (quoting *Schwarzenegger*, 374 F.3d at 803). The Ninth Circuit has applied this test to constitutional torts, including claims alleging a First Amendment violation. *See Yahoo!*, 433 F.3d at 1206.

Here, the complaint alleges that the WePay subpoena was an "intentional act that was expressly aimed at, and caused harm, in California." Compl. ¶ 6. To the extent Donor No. 1 is relying on WePay's location in California, the Supreme Court has held that a defendant's relationship with a third party is insufficient to establish personal jurisdiction. *See Walden*, 134 S. Ct. at 1123. That is consistent with how courts treat personal jurisdiction where the conduct was directed at a third-party resident, but the injured plaintiff resides elsewhere. For example, in *Dudnikov v. Chalk & Vermilion Fine Arts*, 514 F.3d 1063, 1075 (10th Cir. 2008), the court held that sending a letter to a California company to get it to cancel a Colorado company's auction created personal jurisdiction in Colorado, *not* California, because even though all of the defendant's conduct was expressly aimed at California, the defendant intended to injure a company known to reside in Colorado. Similarly, in *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1088 (9th Cir. 2000), the court held that sending a letter to a Virginia company to force a California company into alternative dispute resolution created personal jurisdiction in California, *not* Virginia, because even though all of the defendant's conduct was expressly aimed at Virginia, the

defendant intended to injure a company known to reside in California. Finally, in *Klayman v. Deluca*, No. 14-3190, 2015 U.S. Dist. LEXIS 11403, *11-13 (N.D. Cal. Jan. 30, 2015), the court held that issuing a subpoena to a California company that invaded the privacy of a person known to reside in Florida created personal jurisdiction in Florida, *not* California. In all three instances, the conduct aimed at the third-party resident failed to create personal jurisdiction in that state. Instead, it was where the injured plaintiff resided that mattered.

But that leads to a different problem for Donor No. 1. When the WePay subpoena issued, all of the donors to the Free Barrett Brown fund were anonymous. The Ninth Circuit has stated that *Calder* "cannot stand for the broad proposition that a foreign act with foreseeable effects in the forum state always gives rise to specific jurisdiction." *Wash. Shoe Co. v. A-Z Sporting Goods Inc.*, 704 F.3d 668, 675 (9th Cir. 2012) (quoting *Bancroft*, 223 F.3d at 1087). "[S]omething more" is required; and the Ninth Circuit has "repeatedly stated that the 'express aiming' requirement is satisfied, and specific jurisdiction exists, 'when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant *knows* to be a resident of the forum state.'" *Id.* (quoting *Dole Food Co. v. Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002)) (emphasis added). That is based on the Supreme Court's statement in *Calder* that "untargeted negligence" cannot give rise to specific jurisdiction. *See Brainerd v. Governors of Univ. of Alberta*, 873 F.2d 1257, 1259 (9th Cir. 1989) ("In *Calder*, the Supreme Court distinguished untargeted negligence, which will not amount to purposeful availment, from intentional and allegedly tortious acts expressly aimed at the forum.") (citing *Calder*, 465 U.S. at 789-90); *Thomas v. Thomas*, No. 14-1096, 2015 U.S. Dist. LEXIS 182157, *10 (C.D. Cal. May 8, 2015) ("In general, express aiming requires more than 'untargeted negligence' that merely happened to cause harm to [a plaintiff].") (quoting *Schwarzenegger*, 374 F.3d at 807). Because the donors to the Free Barrett Brown fund were all anonymous, AUSA Heath and SA Smith had no idea who donated to the fund or where they resided. For all they knew, none of the donors lived in California. Or perhaps all of them did, or maybe some lived in California and some did not. The point is that issuance of the subpoena in these circumstances cannot properly be described as conduct targeted at California residents. That one donor allegedly happened to reside in California is simply a "random," "fortuitous," and "attenuated" contact insufficient to give rise

to personal jurisdiction. *See Walden*, 134 S. Ct. at 1123. To suggest otherwise would subject AUSA Heath and SA Smith to personal jurisdiction in every state where any anonymous donor happens to reside. That is not the law.

Moreover, the allegation that Donor No. 1 suffered *any* harm in California is belied by other facts in the complaint. The complaint alleges that WePay sent its response to SA Smith, a citizen of Texas. Compl. ¶¶ 15, 31. AUSA Heath then filed it in the Texas district court under seal. There is no allegation that as a result of the WePay subpoena Donor No. 1's identity has been made known to a single person residing in California. For all intents and purposes, Donor No. 1's identity in California remains secret. Thus, any alleged injury regarding the loss of anonymity occurred in Texas, not California. On this point, the Ninth Circuit's decision in *Schwarzenegger* is instructive. There, the court held that the use of Arnold Schwarzenegger's image in an Ohio advertisement was not aimed at California because although "'[i]t may be true that [the defendant's] intentional act eventually caused harm to Schwarzenegger in California, and [the defendant] may have known that Schwarzenegger lived in California,' the facts did not establish that the defendant *knew* that the impact of his intentional act would be felt in California." *Wash. Shoe*, 704 F.3d at 677 (explaining *Schwarzenegger* case) (emphasis added). In short, because the publication of the image occurred in Ohio, Schwarzenegger failed to sufficiently allege that the defendant knew any harm would occur in California. The same applies here. With no allegation of any disclosure in California, or that AUSA Heath and SA Smith *knew* the impact of issuing the subpoena would be felt in California, the complaint fails to allege facts sufficient to establish personal jurisdiction under prongs two and three of the Ninth Circuit's *Calder* test.

2. <u>The exercise of personal jurisdiction would be unreasonable.</u>

The Court also lacks personal jurisdiction for an additional reason. It is generally understood that responsive contacts with a forum resident are insufficient to establish personal jurisdiction. Thus, for example, sending a cease and desist letter to a forum resident engaged in infringement does not give rise to specific jurisdiction. That is because "[p]rinciples of fair play and substantial justice afford a patentee sufficient latitude to inform others of its patent rights without subjecting itself to jurisdiction in a foreign forum." *Red Wing Shoe Co. v. Hockerson-Halberstadt, Inc.*, 148 F.3d 1355, 1360-61 (Fed. Cir. 1998).

Moreover, there is a strong policy in encouraging cease and desist letters because they seek to settle as oppose to litigate disputes. *See Yahoo!*, 433 F.3d at 1208 (sending cease and desist letter to forum resident "is not in and of itself sufficient to establish personal jurisdiction").

The lesson applies here with comparable force. According to the Guide to Judicial Policy, Brown had an ongoing to duty to inform the district court of any change in his financial status. *See* Guide to Judicial Policy, Vol. 7, Part A, Chapter 2: Appointment and Payment of Counsel, § 210.40.30(c) (referencing criminal defendant's "obligation to inform the court and the appointed attorney of any change in financial status"). As the beneficiary of approximately $20,000 raised for the specific purpose of paying for an attorney and by saying nothing about it, Brown would have been in violation of that continuing duty. AUSA Heath, as an officer of the court with authority to issue the subpoena, had an interest and obligation in assuring that Brown was not abusing public defender resources. *See Hickey*, 997 F. Supp. at 1210. But AUSA Heath and SA Smith had no control over where the evidence of that violation existed. That AUSA Heath needed to subpoena WePay in California was simply a fortuitous circumstance attending her obligation to address Brown's potentially fraudulent conduct in Texas. And there is obviously a strong policy in encouraging prosecutors to trace criminal defendant assets and other funds that could be used to reserve public defender and other Criminal Justice Act resources for those who truly need them. Prosecutors play a vital role in that respect because the courts are not as institutionally well equipped to detect and investigate potential abuses. As with many other aspects of our adversarial system, the federal courts rely on prosecutors to bring such issues, and the evidence needed to resolve them, to the courts' attention. Having done just that in a proceeding in the Northern District of Texas, it would be unfair and unreasonable to subject AUSA Heath and SA Smith to personal jurisdiction in California. Declining jurisdiction is also consistent with the overall reluctance of courts to exercise personal jurisdiction over out-of-state prosecutors who are simply fulfilling their duties in prosecuting cases. Thus, for example, courts have held that it would offend notions of fair play and justice to subject an out-of-state prosecutor to the personal jurisdiction of a foreign court simply for seeking extradition of a defendant who resides in the forum state. *See Wright v. Linhardt*, No. 98-1555, 1999 U.S. Dist. LEXIS 20727, *24 (D. Ore. Sept. 15, 1999); *see also Ray v. Simon*, No. 07-1143, 2008

U.S. Dist. LEXIS 124667, *43 (D.S.C. July 22, 2008). "Otherwise, all discussions between prosecutors attempting to obtain extradition *or information* about a defendant would satisfy personal jurisdiction requirements in a foreign jurisdiction in a subsequent civil action." *Id.* (emphasis added).

When evaluating the fairness of exercising personal jurisdiction, courts also evaluate "(1) [t]he extent of the defendant['s] purposeful interjection into the forum state's affairs; (2) the burden on the defendant of defending in the forum; (3) the extent of conflict with the sovereignty of the defendants' state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum." *Terracom v. Valley Nat'l Bank*, 49 F.3d 555, 561 (9th Cir. 1995). All seven factors are considered and none is dispositive. *Id.* Because Donor No. 1 could not prove purposeful availment, the first factor weighs heavily in favor of AUSA Heath and SA Smith. *See id.* The burden of having to defend this suit in a remote forum also weighs in their favor. *See id.* With respect to the third and fourth factors, while this federal suit does not present a conflict of sovereignty between Texas and California, Texas would have an equal if not stronger interest in the effects of subpoenas issued from courts located in Texas, and certainly would have a strong interest in tracing funds rightfully payable to a public defender organization in Texas. The fifth factor, which focuses on the locations of witnesses, slightly favors Texas because AUSA Heath, SA Smith, Barrett Brown, and his mother all reside in Texas whereas WePay, Donor No. 1, and Kevin Gallagher are located in California. Finally, with respect to the last two factors, there is no reason to believe that a California court would afford more convenient and effective relief than would a Texas court, and the federal district court in Texas serves as an alternative forum. In short, no single factor weighs in favor of California, and the balance of factors leans strongly in favor of Texas, particularly where Donor No. 1 has failed to prove purposeful availment in the first instance. The balance of these factors in addition to the policy concerns in subjecting federal employees to personal suit in a remote forum creates a compelling case that personal jurisdiction here would be both unfair and unreasonable.

For these reasons, this Court should decline to exercise personal jurisdiction over AUSA Heath and SA Smith.

IV. CONCLUSION

For all of the foregoing reasons, AUSA Heath and SA Smith respectfully request this Court dismiss Count One, with prejudice, and dismiss them from this suit altogether.

Respectfully submitted,

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Dated: May 11, 2017

/s/ Siegmund F. Fuchs
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Attorneys for Defendants Candina Heath and Robert Smith

[PROPOSED] ORDER

Having considered Defendants Heath and Smith's Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(2) and 12(b)(6), and any opposition, reply, and oral argument presented, the Court finds that Count One fails to state a claim for relief. The Court further finds that it lacks personal jurisdiction over Defendants Heath and Smith. IT IS HEREBY ORDERED that this action is dismissed with prejudice. In making this determination, the Court considered the following documents:

A. Subpoena to Testify at a Hearing or Trial in a Criminal Case and Attachment

B. Summary of Account and Affidavit in response to the WePay Subpoena

The Court also took judicial notice of the following documents from *United States v. Brown*, No. 12-317 (N.D. Tex.):

C. The Docket Sheet

D. Governments Motion to Direct Funds Be Paid, filed under seal on February 12, 2013

E. Order, dated March 29, 2013 (ECF 49)

F. Order, dated April 17, 2013 (ECF 50)

G. Order, dated May 30, 2013 (ECF 64)

IT IS SO ORDERED.

Dated: _____

_____
MARIA-ELENA JAMES
UNITED STATES MAGISTRATE JUDGE